IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	§	
	§	
SARAH LOUISE FREDRIC,	§	**CASE NO. 00-43542-BJH-13**
	§	
Debtor.	§	
SARAH LOUISE FREDRIC,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	**ADVERSARY NO. 01-4035**
	§	
RHETT KEYSER FREDRIC,	§	
	§	
Defendant.	§	

MEMORANDUM OPINION

In her Complaint to Recover Money or Property and to Obtain Equitable Relief (the "Complaint"), Sarah Louise Fredric (the "Debtor") seeks to have her former spouse, Dr. Rhett Keyser Fredric ("Dr. Fredric") turnover certain property she contends was awarded to her pursuant to a Divorce Decree (the "Divorce Decree") entered by the 360th Judicial District Court of Tarrant County on July 13, 2000.[1] *See* Debtor's Complaint at pp. 2-5 and Divorce Decree at p. 6. In his counterclaim (the "Counterclaim"), Dr. Fredric seeks to recover certain property he contends was awarded to him in the Divorce Decree or the value of that property. *See* Response to Complaint at p. 3; *see also* Divorce Decree at pp. 2-6.

The Court has jurisdiction over this dispute pursuant to 28 U.S.C. §§ 1334 and 157. This is a core proceeding pursuant to 28 U.S.C. § 157. After considering the record and the parties'

[1]Initially, the Debtor also sought to compel Dr. Fredric to satisfy certain federal income tax obligations that he was ordered to pay pursuant to the Divorce Decree. Dr. Fredric paid these tax obligations prior to trial, mooting that portion of the Complaint.

post-hearing briefs, the Court issues this Memorandum Opinion which shall constitute the Court's findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52, made applicable here by Bankruptcy Rule 7052.

I. CONTENTIONS OF THE PARTIES

A. The Debtor

The Debtor contends that she was awarded seventy-five (75%) percent of Merrill Lynch retirement account number 552-89706 (the "Retirement Account") pursuant to the Divorce Decree, but that Dr. Fredric has failed to deliver such interest to her within a reasonable period of time following entry of the Divorce Decree. *See* Complaint at ¶¶ 4-6 and Plaintiff's Exhibit A at p. 6. The Debtor requests that the Court order Dr. Fredric to turnover her portion of the Retirement Account to her. *See id.* The Debtor also contends that she is entitled to a money judgment (plus interest) equal to the difference between the average value of the Retirement Account during the thirty day period after the Divorce Decree was signed and the value of the Retirement Account on the date her share is turned over to her. *See* Complaint at ¶ 8.

In addition, the Debtor contends that she was awarded sixty-five (65%) percent of an insurance premium refund in the aggregate amount of $6,227.00 (the "Insurance Premium Refund") on what was the Debtor's and Dr. Fredric's marital homestead. *See* Complaint at ¶ 12 and Plaintiff's Exhibit A at p. 6. The Debtor contends that Dr. Fredric has refused to turnover such proceeds to her. *See* Complaint at ¶ 12.

Finally, the Debtor seeks to recover the costs and attorney's fees she has incurred in connection with the Complaint. *See id.* at p. 5.

B. Dr. Fredric

Dr. Fredric denies that he was obligated to deliver the Debtor's interest in the Retirement Account to her. *See* Response to Complaint at ¶ 3. Dr. Fredric also denies that the Debtor is entitled to sixty-five percent (65%) of the Insurance Premium Refund, which he contends is not awarded in the Divorce Decree. *See id* at ¶ 5.

In the Counterclaim, Dr. Fredric contends that he was awarded certain property pursuant to the Divorce Decree which the Debtor was to deliver to his office by August 1, 2000. *See id*. at pp. 3-4. Dr. Fredric contends that the Debtor failed to deliver all of the property awarded to him; and thus, the Debtor has converted that property for which exemplary damages are appropriate due to the wilful, wanton and malicious nature of the conversion. *See id.* In addition to exemplary damages, Dr. Fredric seeks to recover the fair market value of the property converted, damages for emotional distress from the loss of property having sentimental value, and his costs and attorney's fees. *See id.* Although not plead in the Counterclaim or in the joint Pretrial Order, Dr. Fredric contended at trial that he is entitled to setoff any judgment he obtains against the Debtor pursuant to the Counterclaim against any amounts he is ordered to turnover to the Debtor.

II. FACTUAL AND PROCEDURAL HISTORY

The Debtor and Dr. Fredric were married for 28 years, but were divorced pursuant to the Divorce Decree. *See* Plaintiff's Exhibit A. The Debtor is a well educated, intelligent woman. Prior to her marriage to Dr. Fredric, the Debtor testified that she was employed as a medical researcher. She did not continue to work outside the home after her marriage to Dr. Fredric. The Debtor testified that she has been unable to return to her prior employment after the divorce because her training in the field is out of date. She would have to return to school for further

education before she could resume her work in her chosen field. Thus, because the Debtor has no other source of support, she is currently working as a pizza delivery person and is earning gross wages of approximately $1,500.00 per month. *See* Debtor's Amended Schedule I, docket no. 41. When she vacated the marital home, the Debtor previously testified that she moved into an efficiency apartment in Fort Worth.

The Debtor filed a voluntary petition under Chapter 13 of the Bankruptcy Code on July 17, 2000. As a result of a dispute concerning property awarded by the Divorce Decree, the Debtor filed the Complaint on March 29, 2001. Dr. Fredric filed his response and the Counterclaim on April 30, 2001.

The Court tried the Complaint and the Counterclaim on August 16, 2001. At the conclusion of the trial, the Court conducted a settlement conference with the parties. The parties agreed to discuss whether the Court should defer its decision on the issues raised by the Complaint and the Counterclaim to enable a further search for property awarded to Dr. Fredric under the Divorce Decree which might be located at storage facilities that were leased by the Debtor at the time she vacated the former marital home. The parties agreed that they would confer and advise the Court if they wanted a ruling or further time to search for the missing items at a status conference the Court scheduled for August 23, 2001. At that status conference, the Court was advised that a few additional items had been located and turned over to Dr. Fredric.[2] The Court was further advised that the Debtor did not want the Court to delay its ruling any longer than was necessary to enable the parties to file briefs on the setoff issue. The parties filed those briefs on September 4, 2001.

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[2]The items located subsequent to trial are items GG, HH, JJ, and UU on Defendant's Exhibit 10.

III. LEGAL ANALYSIS

A. The Retirement Account

Two facts are undisputed. First, the Divorce Decree awarded the Debtor, as her separate property, seventy-five percent (75%) of the Retirement Account. Second, the Debtor has not received her share of the Retirement Account to date.

While Dr. Fredric agreed at trial that the Debtor was awarded seventy-five percent (75%) of the Retirement Account under the Divorce Decree, he testified that *he* was not obligated to give her (or turnover to her) those monies under the Divorce Decree. In essence, Dr. Fredric's position is that while the Debtor was awarded that share of the Retirement Account, *she* was required to take the steps necessary to have the monies delivered to her. However, the Debtor testified that she had filled out the necessary papers with Merrill Lynch, but that Merrill Lynch still refused to release the monies to her.

The parties agreed that the value of the Retirement Account at the time of the divorce was $40,650.00 and that the value of the Retirement Account on May 25, 2001 was $44,780.00. *See* Pretrial Order at p. 3 and Plaintiff's Exhibits D and E. The parties presented no other evidence regarding the value of the Retirement Account.

The Divorce Decree clearly provides, as Dr. Fredric admits, that the Debtor is entitled to seventy-five percent (75%) of the Retirement Account.[3] The Court does not find Dr. Fredric's

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[3]The Divorce Decree provides:

> IT IS ORDERED AND DECREED that the wife, SARAH LOUISE FREDRIC, is awarded the following as her sole and separate property, and the husband is divested of all right, title, interest and claim in and to that property:
>
> . . .
>
> 4. Seventy-five (75%) percent of the Merrill Lynch retirement account number 522-89706.

argument that he was under no obligation to assist the Debtor in her efforts to obtain her share of the Retirement Account persuasive. The Debtor has taken steps to have her share of the monies transferred to her. For some reason, Merrill Lynch has refused to release the monies to the Debtor. However, if asked to release the monies by Dr. Fredric (the title owner of the account), Merrill Lynch would have been legally obligated to release the monies. But Dr. Fredric refused to assist the Debtor in her efforts to obtain that which was clearly awarded to her under the Divorce Decree. Subject to the setoff defense discussed below, Dr. Fredric was under an implicit obligation pursuant to the Divorce Decree to assist the Debtor in her efforts to obtain her share of the Retirement Account when Merrill Lynch refused to release her share to her.

Because Dr. Fredric was not obligated to turnover seventy-five percent (75%) of the Retirement Account to the Debtor on any date certain, and there was no *express* obligation on Dr. Fredric to assist the Debtor in her efforts to obtain her share of the Retirement Account, the Court will not award the Debtor a money judgment for interest which she might have earned on her share of the Retirement Account if it had been received by her promptly following the Divorce Decree.[4] However, the Debtor is entitled to seventy-five percent (75%) of the value of the Retirement Account as of August 16, 2001, plus seventy-five percent (75%) of any interest which has accrued on those monies since that date.[5] Dr. Fredric is directed to take whatever steps are

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Divorce Decree at p. 6.

[4]In addition, the Retirement Account has increased in value since the date of the Divorce Decree. Thus, no additional money judgment to compensate the Debtor for a loss in value due to market fluctuations is required. *See* Debtor's Exhibits D and E.

[5]The Court understands that the parties agreed during the trial to place the funds then in the Retirement Account at interest to avoid further risk of loss pending the Court's decision.

necessary to assist the Debtor in obtaining her share of the Retirement Account immediately upon the entry of a Judgment in this adversary.

B. The Insurance Premium Refund

The Divorce Decree provides as follows:

> IT IS ORDERED AND DECREED that the wife, SARAH LOUISE FREDRIC, is awarded the following as her sole and separate property, and the husband is divested of all right, title, interest, and claim in and to that property:
> ....
> 6. Sixty-five (65%) percent of the net proceeds (net proceeds being defined as the sales price plus net insurance claim proceeds less mortgage balance, receivership fees and expenses, and normal expenses of sale and of repairs as determined by the receiver, Rob Jones) from the sale of the residence at 105 Hazelwood, Fort Worth, Tarrant County, Texas, and under the terms and conditions of the receivership.

See Divorce Decree at p. 6. As noted previously, the Insurance Premium Refund arises as a result of the sale of the marital home and the cancellation of the insurance policy on that home. Thus, in light of the language in the Divorce Decree, the Court must determine whether the Insurance Premium Refund is part of the "net proceeds from the sale of the residence" as defined by the Divorce Decree.

Based on the plain language of the Divorce Decree, the Court determines that the state court definition of "net proceeds" did not contemplate the existence of the Insurance Premium Refund. The Debtor's request that the Court order Dr. Fredric to turnover sixty-five percent (65%) of the Insurance Premium Refund is effectively a request to modify the terms of the Divorce Decree. As the Court lacks jurisdiction to modify the terms of the Divorce Decree, *see In re Calhoun*, 715 F.2d 1103 (6th Cir. 1983) (holding that bankruptcy courts are courts of limited jurisdiction over state court domestic relation matters including modification of divorce decrees);

In re Miller, 36 B.R. 403, 405 (Bankr. Ohio 1984) (holding same), the Court concludes that each party has an undivided one-half interest in the Insurance Premium Refund. Dr. Fredric is required to turnover fifty percent (50%) of the Insurance Premium Refund to the Debtor immediately upon the entry of the Judgment in this adversary.

C. Personal Property Awarded Dr. Fredric by the Divorce Decree

The Divorce Decree awarded Dr. Fredric seventy-two (72) items of personal property. *See* Divorce Decree at pp. 2-4. At trial, Dr. Fredric testified that some of the seventy-two (72) items had been delivered to him (or made available to him to pick up), but that fifty-five (55) items had not been given to him (or otherwise made available to him) (the "Items"), and that the fair market value of the Items, according to prevailing values in Tarrant County, Texas, ranged between $18,933.00 and $19,385.00.[6] *See* Defendant's Exhibit 10 (listing the Items). The Debtor presented no evidence to refute the value of the individual Items as testified to by Dr. Fredric; and thus, the only evidence as to value presented at trial was the testimony of Dr. Fredric. Dr. Fredric testified that approximately thirty-two (32) of the Items had either minimal value (*i.e.* $10.00 or less) or sentimental value only. At trial, Dr. Fredric placed a value in excess of $1,000.00 on only a few of the Items.[7] The aggregate value claimed by Dr. Fredric for the Items ($18,933.00 to $19,385.00) does not include any "sentimental" value.

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[6]This aggregate value was computed by adding the value (pursuant to Dr. Fredric's trial testimony) for each item on Defendant's Exhibit 10, without adding any amount for items with only sentimental value.

[7]Including (i) cups (11) from German crystal punch bowl set ($100 each); (ii) first edition leather bound copy and cased copy of Vanity Fair ($7,000); (iii) leather bound copy of Discourses on Prince Henry ($1,200); and (iv) his Mother's jewelry – including diamond earrings, diamond watch, lapis bumblebee and costume jewelry ($6,250).

The Court finds that based on Dr. Fredric's testimony, the fair market value of the Items is $18,900.00.[8] While it is unfortunate that some Items having obvious sentimental value to Dr. Fredric are "lost,"[9] for the reasons explained below, the Court does not believe that a damage award for emotional distress is appropriate here. *See* pp. 13-14, *infra.*

Dr. Fredric contends that the Debtor's failure to comply with the Divorce Decree and deliver (or otherwise make available to him) the Items constitutes conversion and warrants the imposition of exemplary damages due to the wanton, wilful or malicious nature of the conversion. While the Court agrees that Dr. Fredric established that the Debtor converted most of the Items, the Court will not award exemplary damages here because Dr. Fredric failed to carry his burden of proof that the Debtor wantonly, wilfully or maliciously refused to deliver the Items to him. To be entitled to exemplary damages, Dr. Fredric was required to prove that the Debtor acted intentionally in refusing to deliver the Items and without just cause or excuse. *See*

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[8]This amount is adjusted to reflect a deduction in value for the four items found post-trial that were returned to Dr. Fredric. *See* fn 2, *supra*. The Court additionally notes that the values asserted by Dr. Fredric at trial vary slightly from the values previously asserted in his Response to Plaintiff's First Set of Discovery-Written Interrogatories to Defendant. *See* Plaintiff's Exhibit I. The Court has compared both values asserted and finds only a slight variation in amounts, which are arguably attributable to changes in market value over a period of time.

[9]It is unclear from the testimony whether certain of the Items were made available to Dr. Fredric and he failed to take them from the marital home when he had the opportunity; whether certain of the Items may, in fact, be in Dr. Fredric's possession (because he testified that he had not searched in all of the boxes of items he does have for the Items); or whether some of the Items remain in the Debtor's possession at the storage facilities she leased when she vacated the marital home. As discussed further hereinafter, the Debtor was moved out of the marital home by the insurance company that insured the property due to the significant damage sustained by the home during a tornado. The insurance company's movers did a particularly poor job of packing the Debtor's property (and, perhaps inadvertently, some of the Items) and in unloading that property at the storage facilities. That the Debtor cannot find particular items of property in the storage facilities is not surprising given the condition of the boxes, the lack of any meaningful identification of contents on the outside of the boxes, the ground glass (courtesy of the tornado) found on and in the boxes, and the helter-skelter way in which the boxes were unloaded at the storage facilities. *See* Plaintiff's Exhibit L.

Edmunds v. Sanders, 2 S.W.3d 697, 704 (Tex. App.– El Paso 1999, no writ) (holding that exemplary damages for conversion are available when act was wanton or malicious and legal malice exists when wrongful conduct is intentional and without just cause or excuse); *Annesley v. Tricentrol Oil Trading, Inc.,* 841 S.W.2d 908, 910 (Tex. App. – Hous. [14th Dist.] 1992, writ denied), *abrogated on other grounds by Van Allen v. Blackledge,* 35 S.W.3d 61 (Tex. App. – Hous. [14th Dist.] 2000) (affirming an award of exemplary damages for a conversion where "[t]he jury specifically found that [the defendant's] conversion of the seats was 'intentional,' as was his breach of fiduciary duty. In such a case, malice may be implied."); *George Thomas Homes, Inc. v. Southwest Tension Sys., Inc.,* 763 S.W.2d 797, 800 (Tex. App.– El Paso, 1988, no writ) (holding that exemplary damages for conversion are available when act was wanton or malicious and legal malice exists when wrongful conduct is intentional and without just cause or excuse); *First Nat'l Bank of McAllen v. Brown,* 644 S.W.2d 808, 810 (Tex. App. – Corpus Christi 1982, writ refused n.r.e.) ("In a case where there is a wilful and knowing conversion under circumstances showing a lack of good faith, malice may be implied.").

On March 28, 2000, the parties' marital home was struck by the tornado that damaged downtown Fort Worth and surrounding areas. The Debtor testified that following the tornado, the parties' marital home was not habitable due to broken windows, some structural damage, downed trees, and a lack of running water and electricity. As a result of the tornado damage to the home, the home was placed in the hands of a receiver by the state court presiding over the parties' divorce to oversee the removal of property from the home and the sale of the home. Specifically, the state court asked Constable Jack Allen from Tarrant County Precinct 4 to

accompany insurance adjustors to the home, to accompany Dr. Fredric to the home to remove items awarded to him in the Divorce Decree, and to assist the Debtor in moving out of the home.

As noted previously, the insurance company provided moving personnel to box up the property remaining in the home. Constable Allen testified that he and his assistant, Constable Barbara Jernigan, were responsible for supervising the packing of the items in the home and for seeing to it that items awarded to Dr. Fredric, as listed on an inventory provided by the state court, were made available to him. *See* Plaintiff's Exhibits K and J. Over a several day period, Constables Allen and/or Jernigan supervised the packing of in excess of 500 bags and boxes of items located in the parties' home. Most of these boxes and bags were taken to storage facilities leased by the Debtor.[10] Constable Allen's notes indicate that seven to nine boxes were packed with Dr. Fredric's items and left in the home for Dr. Fredric to pick up.

The Divorce Decree clearly awarded the Items to Dr. Fredric. The Debtor resided in the martial home until the tornado of March 2000. According to Dr. Fredric's testimony, the Debtor had possession of the Items because they were located at the marital home. Moreover, the state court previously found that the Debtor had possession of the Items and ordered her to deliver the Items to Dr. Fredric. The Debtor did not effectively rebut Dr. Fredric's testimony. She testified that as she was preparing to move out of the marital home, she would set aside items that were awarded to Dr. Fredric as she came across them and that those items were boxed up for him to pick up. However, with respect to the Items, she generally testified that she did not know where they were and did not have them. However, with respect to one of the Items (the "bronzed"

[10]Constable Allen's notes indicate that two storage facilities were utilized for the storage of property from the Debtor's home. *See* Plaintiff's Exhibit K. Subsequent to trial, the Debtor apparently examined the smaller of the two storage facilities and located the items listed *supra* at fn 2.

cowboy boots of their son), it was clear that the Debtor did have possession of the boots and was withholding them because they were not "bronzed." Rather, according to the Debtor, the boots had been preserved with a different metallic spray that the Debtor had purchased and applied. Moreover, the Debtor testified that she had not investigated the contents of the boxes in the leased storage facilities in order to determine if the Items were there due to the condition of those facilities.

While Dr. Fredric admitted at trial that he had not investigated the contents of each of the boxes he removed from the marital home to insure that none of the Items was in those boxes, the preponderance of the evidence establishes that most of the Items were not delivered to him as required by the Divorce Decree,[11] which, when combined with the state court finding that the Debtor had possession of the Items, technically constitutes a conversion of the Items by the Debtor. *See Revie v. Smith (In re Moody),* 899 F.2d 383, 358 (5th Cir.1990) (holding intent to convert is not an essential element of conversion; the defendant only need do an act amounting to a conversion); *Huffmeyer v. Mann,* 49 S.W.3d 554, 558 (Tex. App.– Corpus Christi 2001) (holding that to establish conversion, a plaintiff must prove that (i) the plaintiff owned, had legal possession of, or was entitled to possession of the property; (ii) the defendant assumed and exercised dominion and control over the property in an unlawful and unauthorized manner, to the exclusion of and inconsistent with the plaintiff's rights; and (iii) the defendant refused the plaintiff's demand for the return of the property); *McVea v. Verkins,* 587 S.W.2d 526, 531 (Tex.

[11]In coming to this conclusion, the Court relies heavily on the inventory lists maintained by Constables Allen and Jernigan. With a few exceptions (*i.e.*, the crystal cups), the Constables' lists evidence that Dr. Fredric did not receive the Items.

App. – Corpus Christi 1979, no writ) ("[A] good faith but unauthorized retention of property can be a conversion.").

However, on this record the Court cannot find that the Debtor wilfully, wantonly or maliciously converted the Items. Given the emotional stress that the Debtor obviously felt as a result of the divorce, the tornado, her new job, her new living conditions, and her chapter 13 filing, and the condition of the storage facilities where the Items may be located, the Debtor's failure to deliver the Items to Dr. Fredric was not wanton, wilful, or malicious. Absent a finding of wanton, wilful, or malicious conduct by the Debtor, the Court cannot award exemplary damages for the Debtor's conversion of the Items.

Further, the Court cannot award emotional distress damages to Dr. Fredric. To recover emotional distress damages, an injury must be alleged with specificity; more than vague allegations are required to establish an injury. *See Giles v. General Electric Co.*, 245 F.3d 474, 488 (5th Cir. 2001) ("There are two requirements to prove emotional distress, the first of which is specificity with respect to the alleged injury....Second we require more than vague allegations to establish existence of the injury."); *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1047 (5th Cir. 1998) ("[T]here must be a specific discernable injury to the claimant's emotional state, proven with evidence regarding the nature and extent of the harm...[H]urt feelings, anger and frustration are a part of life...and [are] not the types of harm that could support a mental anguish award.").

Dr. Fredric testified that the loss of the Items was troubling to him, but he failed to plead or prove, with specificity, any injury resulting from the loss of the Items. When asked on cross examination if he was seeking professional help to deal with the events of his life, if he had ever

sought such help, or if he was taking medication, Dr. Fredic testified that he had not sought professional help and was on no medication.

As noted by the Fifth Circuit in *Brady v. Fort Bend County,* 145 F.3d 691, 719 (5th Cir. 1998) (quoting *Price v. City of Charlotte,* 93 F.3d 1241, 1250 (4th Cir. 1996)), because "'emotional distress [is] fraught with vagueness and speculation, [and] is easily susceptible to fictitious and trivial claims' we must 'scrupulously analyze an award of compensatory damages for a claim of emotional distress predicated exclusively on the plaintiff's testimony.'" Dr. Fredric presented no evidence other than his own testimony regarding his emotional distress. That testimony was not compelling; and thus, Dr. Fredric's request for emotional distress damages must be denied.

D. The Applicability of Setoff

In his closing argument, counsel for Dr. Fredric argued that Dr. Fredric should be allowed to setoff the value of the Items awarded to him in the Divorce Decree against the Debtor's share of the Retirement Account. However, Dr. Fredric did not plead setoff (i) in his response to the Complaint or in the Counterclaim, (ii) in his Proposed Findings of Fact and Conclusions of Law, or (iii) in the joint Pretrial Order. The Debtor objects to any setoff, claiming waiver and prejudice.

Thus, the Court must determine whether Dr. Fredric waived any claim of setoff due to his failure to specifically plead such a claim. The Supreme Court has stated that "[t]he right of setoff (also called offset) allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding the absurdity of making A pay B when B owes A." *See Citizens Bank of Maryland v. Strumpf,* 516 U.S. 16 (1995). The only requirements for setoff are that the

debts and claims be mutual and prepetition. *See Braniff Airways, Inc. v. Exxon Co., U.S.A.*, 814 F.2d 1030, 1037 (5th Cir. 1987). Numerous courts have determined that setoff is an affirmative defense that must be plead and proven. *First Nat'l Bank v. Hurricane Elkhorn Coal Corp. II,* 763 F.2d 188, 190 (6th Cir. 1985) (setoff is an affirmative defense which must be plead and proven); *Chapes, Ltd. v. Anderson (In re Scaife),* 825 F.2d 357, 362 (11th Cir. 1987) (holding same); *Durham v. SMI Industries Corp.,* 882 F.2d 881, 883 (4th Cir. 1989) (holding same); *Tavormina v. ITT Commercial Finance Corp. (In re Aquasport, Inc.),* 115 B.R. 720, 722 (Bankr. S.D. Fla. 1990) (holding same).

Recognizing that a claim of setoff can be waived, the Fifth Circuit has held that under some circumstances, setoff is not waived simply by a failure to plead setoff in a defendant's answer. For example, in *Stephenson v. Salisbury (In re Corland Corp.),* 967 F.2d 1069 (5th Cir. 1992), the Court held that a defendant who did not plead setoff in his original answer or in a later motion for summary judgment did not waive setoff when the issue was raised and briefed by both parties prior to trial. The Fifth Circuit has also held that a "court may excuse a violation of Rule 8(c) in the absence of prejudice to the other party." *See Giles v. Gen. Elec. Co.,* 245 F.3d 474, 494 (5th Cir. 2001) (holding that plaintiff was not prejudice because both parties briefed the issue of offset prior to trial).

Generally, a decision that a party waived a claim of setoff results in separate judgments being enforceable against the parties – *i.e.*, a judgment for A against B and a separate judgment for B against A. However, given the Debtor's bankruptcy filing, a finding of a waiver of a proper claim of setoff will result in Dr. Fredric obtaining a judgment against the Debtor that is nothing more than a prepetition unsecured claim in her bankruptcy case. Under the Debtor's confirmed

chapter 13 plan, unsecured creditors receive a two percent (2%) distribution. *See* Debtor's Chapter 13 Plan, docket no. 32. If Dr. Fredric's unsecured claim in the amount of $18,900.00 is included, the distribution will be reduced to approximately one percent (1%).

Dr. Fredric did not assert his claim of setoff until his counsel's closing argument. Of course, this argument was made after the evidence was closed. Counsel for the Debtor immediately interrupted that closing argument and objected to the issue of setoff being asserted at that time due to a failure to plead it previously and prejudice to the Debtor. In her post-trial brief, the Debtor makes the same arguments. *See* Debtor's Brief to the Court for Disallowance of Offset at p. 3. Regarding prejudice to her, the Debtor contends that she did not refute Dr. Fredric's testimony regarding the value of the Items because she believed that he was only seeking an unsecured claim in her bankruptcy case. If she had known that he intended to seek a setoff against her share of the Retirement Account or the Insurance Premium Refund, she would have disputed his values and offered expert testimony to support her view of the proper value of the Items. *See id.*

Due to the fact that Dr. Fredric did not raise any claim of setoff in any pleading that he filed prior to trial (his response to the Complaint, the Counterclaim, his Proposed Findings of Fact and Conclusions of Law, or the joint Pretrial Order), the Court concludes that Dr. Fredric waived his defense of setoff. The facts here are distinguishable from the facts in both *Stephenson* and *Giles*, where the Fifth Circuit allowed setoff although not originally plead, because the issue was raised prior to trial and there was no prejudice to the opposing party. Here, the Debtor will be prejudiced if Dr. Fredric is permitted to assert his affirmative defense of setoff after the close of the evidence. While Dr. Fredric's counsel did not offer to allow a reopening of the evidence

to avoid prejudice, that alone would not be sufficient here because the Debtor did not hire an expert to value the Items believing that any judgment (or claim) awarded in Dr. Fredric's favor could be dealt with under her chapter 13 plan. To allow an assertion of setoff at this late date would essentially require a reopening of not only the evidence, but several time periods set forth in the Court's Scheduling Order so that the Debtor could hire an expert witness, that expert could prepare a valuation report, and then be deposed prior to resuming the trial.

After considering all of the relevant factors, the Court concludes that Dr. Fredric waived the affirmative defense of setoff by failing to assert such claim until after the close of the evidence at trial.[12] Since Dr. Fredric waived the affirmative defense of setoff, the Court awards Dr. Fredric a money judgment against the Debtor in the amount of $18,900.00 as actual damages for the Debtor's conversion of the Items.

With regard to Dr. Fredric's request for pre-judgment interest, no statute governs the award of pre-judgment interest in federal courts. *See Boyer v. Davis (In re U.S.A. Diversified Products, Inc.),* 193 B.R. 868, 881 (Bankr. N.D. Indiana 1995) (stating that no statute governs an award of pre-judgment interest). The Court has discretion to award pre-judgment interest. *See Myron v. Chicoine*, 678 F.2d 727, 734 (7th Cir. 1982) (awarding pre-judgment interest is in the discretion of the court). Under the circumstances of this case, the Court concludes that pre-judgment interest is not appropriate.

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[12]Alternatively, the Court concludes that the requirements of setoff are not satisfied here. The Debtor is not seeking a judgment against Dr. Fredric for the value of the Retirement Account. Rather, the Debtor is seeking an order compelling Dr. Fredric to assist her in her efforts to obtain possession of property that the Texas state court awarded to her as her separate property in the Divorce Decree. The result of the trial of the Complaint is not a Judgment against Dr. Fredric for money damages (that Dr. Fredric would otherwise have to satisfy out of his separate property). Rather, Dr. Fredric is being ordered to take whatever steps are necessary to insure that the Debtor actually receives that property awarded to her over a year ago by the Texas state court as her separate property.

With regard to post-judgment interest, because the effect of the Court's ruling is to give Dr. Fredric a prepetition unsecured claim against the Debtor, Dr. Fredric is not entitled to post-judgment (here, post-petition) interest. The long standing rule in bankruptcy is that unsecured creditors are not entitled to post-petition interest on their claims. *See In re Twin Parks Ltd. Partnership*, 720 F.2d 1374, 1377 (4th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984) (holding unsecured creditors are not entitled to post-petition interest on their claims); *Pierce v. Pyritz*, 200 B.R. 203, 206 (Bankr. N.D. Ill. 1996) (holding same); *In re United States Lines, Inc.*, 199 B.R. 476, 481 (Bankr. S.D.N.Y. 1996) (holding same).

Thus, the actual damages found due to Dr. Fredric shall be treated as a prepetition unsecured claim against the Debtor and neither pre-judgment nor post-judgment interest are appropriate.

E. Request for Attorney's Fees

Both the Debtor and Dr. Fredric have requested that the Court award them attorney's fees in connection with this adversary. Although both parties assert a right to recover her/his reasonable attorney's fees, the legal basis for such an award of attorney's fees to either party is not specifically plead.

Under the "American Rule," in cases brought under federal law, attorney's fees are not ordinarily recoverable absent specific statutory authority, a contractual right, or aggravated conduct. *See Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975); *Dennison v. Hammond (In re Hammond),* 236 B.R. 751, 769 (Bankr. D. Utah 1998). With respect to the Debtor's request for fees, there is no general right to recover attorney's fees under the Bankruptcy Code. *See Renfrow v. Draper*, 232 F.3d 688, 693 (9th Cir. 2000). Moreover,

there is no right to recover attorney's fees in connection with a turnover action under section 542 of the Bankruptcy Code. *See Leverette v. NCNB South Carolina, (In re Leverette),* 118 B.R. 407, 410 (Bankr. D. S.C. 1990) (holding that "[s]ince there is no statutory basis for an award of attorneys fees and costs in bringing in an adversary proceeding for turnover, the general "American Rule" against awarding attorney fees and costs to the successful litigants would appear to prevail.") Finally, the Divorce Decree does not provide for a recovery of attorney's fees if one spouse is required to hire an attorney to enforce its terms. As no specific statutory authority or contractual right exists for awarding attorney's fees, and the Debtor failed to present evidence of aggravated conduct, the Court concludes that the Debtor should bear her own costs and attorney's fees.

With respect to Dr. Fredric's request to recover his attorney's fees, the Court comes to the same conclusion. Under Texas state law, there is no right to recover attorney's fees in connection with a conversion action. *See FDIC v. Golden Imports, Inc.,* 859 S.W.2d 635, 646-47 (Tex. App.– Houston [1st Dist.] 1993, no writ) (holding that attorney's fees incurred by a plaintiff in maintaining a conversion action are not recoverable); *Pierson v. GFH Financial Servs. Corp.,* 829 S.W.2d 311, 316 (Tex. App.– Austin 1992, no writ) (holding same); *Donnelly v. Young,* 471 S.W.2d 888, 891 (Tex. App. – Fort Worth 1971, writ ref'd n.r.e.) (holding same). Moreover, as noted previously, the Divorce Decree does not provide for a recovery of attorney's fees if one spouse is required to hire an attorney to enforce its terms. As no specific statutory authority or contractual right exists for awarding attorney's fees, and Dr. Fredric failed to present evidence of aggravated conduct, the Court concludes that Dr. Fredric should bear his own costs and attorney's fees.

A Judgment consistent with the Memorandum Opinion will be entered concurrently herewith.

Signed: September 27, 2001

Barbara J. Houser
United States Bankruptcy Judge